Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	RM-8117, RM-8030
Future Development of SMR Systems	)	RM-8029
in the 800 MHz Frequency Band	)	
	)	
Implementation of Sections 3(n)	)	GN Docket No. 93-252
and 332 of the Communications Act	)	
Regulatory Treatment of Mobile Services	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act --	)	
Competitive Bidding	)	

To: The Commission

COMMENTS OF SMR SYSTEMS, INC.

SMR Systems, Inc. ("SSI"), by its attorneys and pursuant to the invitation of the Federal Communications Commission ("FCC" or "Commission") in its *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making* (referred to collectively as the *"800 MHz SMR Order"*) released December 15, 1995 in the above captioned proceeding, hereby submits its Comments in response to the mandatory relocation plan proposed in the *Second Further Notice of Proposed Rulemaking ("Notice")* portion of the *800 MHz SMR Order*.

Statement of Interest

SSI is the licensee of numerous Specialized Mobile Radio ("SMR") channels operating in both the upper 10 MHz and lower 80 channels in Omaha, Nebraska. As such, if SSI does not obtain the

license for its Economic Area ("EA") when the spectrum is auctioned, it may be required by the auction winner to relocate to less desirable spectrum under terms and conditions that will not allow it to continue to successfully operate its SMR business. Accordingly, SSI will be adversely affected by the Commission's proposal.

Discussion

Under the Commission's mandatory relocation plan, winning EA licensees have the right to relocate incumbents such as SSI from their spectrum provided the winning EA licensee notifies the incumbent of its intent to do so within 90 days from the date of grant of the EA license.[1] The Commission has imposed a two-phase mandatory relocation mechanism under which there is a fixed one-year period for voluntary negotiations between EA licensees and incumbents and a two-year period for mandatory negotiations. Under this mechanism, if an EA licensee and an incumbent fail to reach an agreement by the mandatory negotiation period, then the EA licensee may request involuntary relocation of the incumbent's system provided that the EA licensee: (1) guarantees payment of all costs of relocating the incumbent to comparable facilities; (2) completes all activities necessary for placing the new facilities into operation, including engineering and frequency coordination, if necessary; and (3) builds and tests the incumbent's new system.[2] SSI believes that the mandatory relocation process is inherently

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[1] *800 MHz SMR Order* at para. 78.

[2] *800 MHz SMR Order* at para. 79.

unfair and could potentially place it out of business despite the Commission's attempt to ensure that there are safeguards in place to make SSI whole. Accordingly, SSI intends to petition for reconsideration of the Commission's First Report and Order in this proceeding. However, in the event that SSI is not successful in its appeal, SSI is addressing the additional issues raised by the Commission in its Second Further Notice of Proposed Rulemaking concerning the cost-sharing mechanism tentatively proposed by the Commission whereby the costs of relocation are *pro rated* among the various EA licensees.[3]

Collective Negotiations

The Commission has tentatively concluded that an incumbent licensee may require all EA licensees who have properly notified the incumbent within the 90 day notification period to collectively negotiate with the incumbent. Collective negotiations will facilitate the relocation process and afford SSI an opportunity to obtain the best possible arrangement for relocation. Negotiating individually with each EA licensee would be burdensome and would not allow for simultaneous relocation of SSI's channels, especially in light of the fact that SSI holds licenses that span all three spectrum blocks in the upper 10 MHz band. Accordingly, SSI supports the Commission's conclusion to require all EA licensees to jointly negotiate with incumbents.

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[3] Within SSI's service area, there could potentially be three EA licensees: A block, B block and C Block.

Compensable Costs

The Commission has tentatively concluded that "actual relocation costs" would include, but not be limited to: SMR equipment, towers and/or modifications; back-up power equipment, engineering costs; installation; system testing; FCC filing costs; site acquisition and civil works; zoning costs; training; disposal of old equipment; test equipment; spare equipment; project management; and site lease negotiation. *Notice* at para. 272. There are many other cost factors related to relocation that the Commission has not explicitly addressed. By way of example, there is the cost of manpower involved in negotiating with the EA licensee, including the legal review of agreements and conditions under which the incumbent will relocate. In addition, there are the costs of marketing and educating existing customers concerning the relocation, replacing customer equipment or, in the worst case scenario, the costs of losing customers to new EA licensees due to the customer not wanting to bother with changing out his equipment. The incumbent would not incur any of these charges, but for mandatory relocation. There are also numerous administrative costs involved in determining which spectrum will be best suited for the incumbent's relocation and whether suitable equipment is available. Given that the incumbent does not know which spectrum it will be relocated to and whether equipment will be readily available, it is difficult to determine what other costs may be involved.

The Commission's list of "actual relocation costs" should by no means be considered exhaustive nor be used to penalize an

incumbent who is acting in good faith to negotiate relocation. SSI suggests that the Commission explicitly recognize that costs of the type discussed above are reimbursable relocation costs. SSI also commends the Commission for its recognition that the "seamless" transition obligation imposed on EA licensees may require that a relocated incumbents' old system and its new post-relocation system operate simultaneously for a period in order to avoid significant service disruption. SSI urges the Commission to go beyond the mere recognition of the potential need for simultaneous operation. In order for an incumbent SMR licensee to retain its existing customer base, it will be necessary for it to operate on both sets of frequencies during a transition period. Otherwise the resulting service disruption is sure to deter existing customers from following their provider to the new band, and thus reduce the competition in the wireless marketplace that this proceeding was designed to foster. For this reason, SSI recommends that the Commission recognize concurrent operation on old and new frequencies for a minimum of one year as a reimbursable relocation expense.

The Commission should recognize that there is no guarantee that a successful incumbent such as SSI will continue to be successful once relocated to new spectrum. Although SSI's customers are currently satisfied with the service SSI provides, there is no guarantee that relocation to different spectrum will keep these customers happy. Not only are service disruptions likely, new frequencies are unlikely to provide users with the same

propagation characteristics that they are accustomed. Indeed, the more SSI investigates the possibilities, the more it believes that many incumbents may simply compute the theoretical costs and sell out to the EA licensee rather than continuing their operations from a new spectrum home.

Dispute Resolution

The *Notice* proposes that parties resolve disputes over the amount of reimbursement through the use of alternative dispute resolution ("ADR") and questions whether industry trade associations or the FCC's Compliance and Information Bureau should be designated as arbiters for such disputes. While SSI does not oppose the use of ADR, and believes that its use should accelerate the process of relocation, SSI opposes the designation of industry trade associations as arbiters of such disputes. Industry trade associations are political entities and, as such, represent differing interests under their organizational umbrellas. While SSI does not believe that such organizations would exhibit intentional bias toward one side or the other in an arbitration, like the child told not to think about elephants, it will be difficult for them to set aside their relationship with the individual entities involved in the dispute and the interests they represent. Parties will undoubtedly question the impartiality of an arbiter composed of trade association representatives. Because even the appearance of impropriety or partiality is enough to taint the entire arbitration process, the FCC's Compliance and

Information Bureau should be the entity designated as arbiter of reimbursement disputes.

Comparable Facilities

The Commission has tentatively concluded that "comparable facilities", at a minimum, should provide the same level of service as the incumbents' existing facilities. Under the Commission's definition of "comparable facilities" a relocated incumbent would: (a) receive the same number of channels with the same bandwidth; (b) have its entire system relocated, not just those frequencies desired by a particular EA licensee; and, (c) once relocated, have a 40 dBu service contour that encompasses all of the territory covered by the 40 dBu contour of its original system. *Notice* at para. 283. These characteristics go a long way toward establishing a "baseline" definition of comparable facilities. However, the Commission should also stipulate that an incumbent licensee must be relocated to spectrum that has the same propagation characteristics as its existing system. Again, the Commission has not indicated which spectrum incumbents will be relocated to and as such there is no assurance that equipment operating in the existing spectrum will be technically compatible with equipment operating in the new spectrum. The change in spectrum should, at a minimum, be transparent to the user. In the event the incumbent is relocated to less desirable spectrum, the user or customer will be less likely to continue to obtain service from the incumbent and will seek service from the EA licensee or another comparable service

provider.

Good Faith Negotiation

While SSI does not oppose the notion of a "good faith" negotiating requirement with respect to relocation, it strongly disagrees with the Commission's tentative conclusion that an offer by an upper 10 MHz EA licensee to replace an incumbent's system with comparable facilities constitutes a good faith offer, and an incumbent's failure to accept such an offer creates a rebuttable presumption that the incumbent is not acting in good faith. Such a presumption allows the EA licensee to dictate what constitutes "comparable" facilities. Allowing an EA licensee to obtain this presumption merely by offering what it claims to be comparable facilities totally fails to recognize that the issue of what are "comparable" facilities is at the very heart of relocation negotiations. Incumbent licensees should not be required to overcome such a presumption unless an impartial arbitrator (as discussed above) agrees that the incumbent has rejected an offer of "comparable facilities."

For the foregoing reasons, SSI respectfully requests that the Federal Communications Commission adopt relocation rules in a manner consistent with the views expressed herein.

Respectfully submitted,

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